

LETTER OPINION
94-L-134

April 29, 1994

Mr. John Mahoney
Oliver County State's Attorney
Oliver County Courthouse
Center, ND 58530

Dear Mr. Mahoney:

Thank you for your March 22, 1994, letter asking whether a county may reopen a section line road previously closed pursuant to North Dakota Century Code (N.D.C.C.) ? 24-07-03.

In your letter you state that N.D.C.C. ? 24-07-03 does not provide for a mechanism to reopen a section line previously closed. However, N.D.C.C. ? 24-07-04 does give counties and townships general jurisdiction over proceedings to open or vacate highways. N.D.C.C. ? 24-07-05 provides that "[t]he board having jurisdiction as provided in this chapter may alter or discontinue any road or lay out any new road upon the petition of not less than six qualified electors who have an ownership interest in real estate in the vicinity of the road to be altered, discontinued or laid out." Thus, counties otherwise having jurisdiction under N.D.C.C. ? 24-07-04 may upon the filing of six or more interested qualified electors provide for a highway on a previously closed section line. The only remaining question is whether condemnation proceedings need be instituted given the section line's previous closure under N.D.C.C. ? 24-07-03.

Section line roads have acquired a unique status in North Dakota. Such roads were granted to North Dakota by Congress, Act of July 26, 1866, ch. 262, ? 8, 14 Stat. 251, 253 (1866). This congressional act has been construed as an offer of public land for highway purposes which states could accept in a variety of ways. DeLair v. County of LaMoure, 326 N.W.2d 55, 59 (N.D. 1982). The Dakota Territorial Legislature

accepted the grant in an 1871 law providing: "hereafter all section lines in this territory shall be and are hereby declared public highways. . . ." An Act Regulating the Laying Out of Public Highways, ch. 33, § 1, 1870-1871 Laws of Dakota Terr. 519, 519-520 (1871) (codified at ch. 29, § 1 1877 Rev. Code 125).

Early on the North Dakota Supreme Court concluded that the section line easements accepted by the Dakota Territory were held by the State of North Dakota in trust for the benefit of the public. Wenburg v. Gibbs Township, 153 N.W. 440 (N.D. 1915).¹ See also Huffman v. Board of Supervisors of West Bay Township, 182 N.W. 459 (N.D. 1921). This principle was recognized in Small v. Burleigh Co., 225 N.W.2d 295, 298 (N.D. 1974) when the court said that "the legislature's belated tolerance of fencing section lines is not effective to deprive the public of rights dating back to 1871" The application of the Public Trust Doctrine to section line easements further guided the North Dakota Supreme Court's interpretation of former North Dakota Century Code § 24-06-28 relating to the obstruction of section lines.² Saetz v. Heiser, 240 N.W.2d 67, 72 (N.D. 1976) ("[w]e conclude that the Legislature did not intend to violate its trust by tolerating fencing in any form which would effectively deprive the public of its right to free passage over section lines. . . .").

We conclude that the balancing of the rights can only be validly accomplished, without a violation of the

¹On rehearing the North Dakota Supreme Court in Wenburg v. Gibbs Township stated "[w]e very much doubt the power of the Legislature to waive a right of way granted by Congress in 1866 and accepted in 1871, especially as the state did not own said right of way, but merely held as trustee for the public;" 153 N.W. at 442.

²For a discussion of the Public Trust Doctrine in North Dakota, see United Plainsmen v. North Dakota State Water Conservation Comm'n, 247 N.W.2d 457 (N.D. 1976) and Don Negard, Note, The Public Trust Doctrine in North Dakota, 54 N.D.L.Rev. 565 (1978). See also J.P. Furlong Enter. v. Sun Exploration and Prod. Co., 423 N.W.2d 130 (N.D. 1988); Matter of Ownership of Bed of Devils Lake, 423 N.W.2d 141 (N.D. 1988) (Pederson, J. dissenting).

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trust, by interpreting ? 24-06-28 as requiring cattle guards and gateways at every point where a fence line intersects a section line, pursuant to the provisions of Chapter 24-10, NDCC").

In my opinion, given the unique status of section lines and the North Dakota Supreme Court's previous application of the Public Trust Doctrine to such easements, N.D.C.C. ? 24-07-03 must be construed as providing only for the temporary, albeit indeterminate, closure of section lines. See Letter from First Assistant Attorney General Paul M. Sand to John Romanick, McLean County State's Attorney (July 6, 1972); 1976 N.D. Op. Att'y Gen. 146; 1976 N.D. Op. Att'y Gen. 142. (Copies enclosed.) N.D.C.C. ? 24-07-03 does not provide for the relinquishment of the public rights of way but rather only the "closure" of section lines under certain circumstances. Therefore, no condemnation proceedings would need to be instituted in order to reopen a section line previously closed pursuant to N.D.C.C. ? 24-07-03.

Sincerely,

Heidi Heitkamp
ATTORNEY GENERAL

tca/vkk